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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ANA CASAS,

Plaintiff and Appellant,

v.

RECORD TOWN USA, LLC,

Defendant and Respondent.

B210527

(Los Angeles County
Super. Ct. No. VC048263)

APPEAL from an order of the Superior Court of Los Angeles County, Daniel S. Murphy, Judge. Dismissed.

Center for Disability Access and Russell C. Handy for Appellant.

Golob, Bragin & Sassoe and Albert L. Sassoe, Jr. for Respondent.

INTRODUCTION

Ana Casas sued Record Town USA, LLC, dba Wherehouse (Record Town) for violation of federal and state statutes designed to provide equal access to public accommodations to persons with disabilities. After the action was settled, Casas moved for and was awarded attorneys' fees. Record Town paid and Casas accepted the amount of attorneys' fees awarded by the trial court. Casas appealed, claiming the trial court abused its discretion in not awarding her a larger amount. Record Town filed a motion to dismiss the appeal arguing it was filed too late and that Casas has waived her right to appeal the trial court's order. We conclude the appeal is timely, but must nevertheless be dismissed. Casas's acceptance of payment of the fee award precludes her appeal.

FACTUAL AND PROCEDURAL BACKGROUND¹

In February 2007, Casas sued Record Town for violation of Title III of the Americans with Disabilities Act, 42 U.S.C. section 12101, et seq. (ADA), and state statutes prohibiting discrimination against persons with disabilities in places of public accommodation, the Unruh Civil Rights Act (Civ. Code, § 51), and the California Disabled Persons Act (Civ. Code, § 54.3). Casas, who is a quadriplegic and uses a scooter for mobility, went into a Record Town retail facility in October 2006 to purchase tickets for a concert. The facility lacked an accessible sales counter. As a result, Casas was unable to patronize the store on a "full and equal" basis with its nondisabled patrons. Casas sought injunctive relief (barrier-free access for persons with disabilities), statutory fees and penalties, and attorneys' fees. In March 2007, Record Town remodeled its facility and provided a wheelchair accessible counter.

At a hearing in February 2008, the parties entered into a settlement agreement, the terms of which memorialized in a formal "Settlement Agreement and Mutual Release"

¹ The appellate record is limited because this case arises out of a settlement. However, certain background facts are not disputed in the briefs. We treat those facts as true for purposes of this appeal, even though they are not established by the record.

(the Agreement), in April 2008. The parties stipulated that Record Town would pay Casas \$1,000 for its unintentional violation of the ADA, as that statute is incorporated in state law by the California Disabled Persons Act, in full settlement of her claims. The parties also agreed Casas could “file a motion to seek an award of attorneys fees and costs, . . . that Record Town [would] oppose [Casas’s] motion and . . . that Record Town [would] pay [Casas’s] attorneys fees as awarded by the Court.” The Agreement also provided that, once Casas received payment of the settlement funds and any attorneys’ fees award, she would “dismiss Record Town and the Entire ACTION with prejudice.”

Casas filed a motion seeking \$16,076.50 in attorneys’ fees and costs. Record Town opposed the motion. It argued Casas’s counsel was engaged in the business of targeting entities like Record Town for isolated access violations solely to obtain statutory attorneys’ fees, as evidenced by the boilerplate complaint Casas’s attorneys filed in this action and in a number of virtually identical cases. It noted the accessibility violation at its store was remedied even before it filed an answer to the complaint. Record Town disputed Casas’s assertion that she prevailed in this action, in light of the fact the case was settled with no admission of liability, and the settlement was premised solely on a claim for an unintentional access violation. Finally, Record Town noted it had never been contacted by Casas or her attorneys or given an opportunity to cure the accessibility problem in advance of this action, and that Casas had turned down its offer of \$1,250 to settle the action in January 2008. Under these circumstances, Record Town argued Casas was only entitled to a nominal award.

The attorneys’ fees motion was argued on June 6, 2008. At the outset of the hearing, the court indicated its inclination to award only \$500. However, as the hearing ended, the court said it had been persuaded by Casas’s counsel to reconsider its tentative ruling. The fee award was increased \$2,000. Record Town tendered a check for \$2,000 to Casas on June 18, 2008. Casas accepted and negotiated that check without protest on June 24, 2008. She filed a notice of appeal on August 18, 2008.

DISCUSSION

1. *The appeal is timely.*

Record Town insists we lack jurisdiction to consider and must dismiss this appeal because Casas's notice of appeal was not timely filed.

At the hearing on June 6, 2008, the trial court ordered Record Town to serve notice of the ruling granting Casas's motion. It did so on June 12, 2008. Casas served her own "Notice of Ruling" of the order granting attorneys' fees on June 6, 2008. Record Town maintains this appeal is untimely because Casas's notice of appeal was not filed until August 18, 2008, a date beyond the 60-day jurisdictional limit mandated by California Rules of Court, rule 8.104(a) [providing that an appeal must be filed within 60 days of the date of service of notice of entry of an appealable ruling.] Record Town is mistaken.

The 60-day period begins to run upon entry of an appealable order. A notice of ruling is not an appealable order. (*Shpiller v. Harry C's Redlands* (1993) 13 Cal.App.4th 1177, 1179.) Particularly so where, as here, the order granting the motion directed Record Town to "prepare notice of the court's ruling." Where a "minute order directs that a written order be prepared, the entry date is the date the signed order is filed." (Cal. Rules of Court, rule 8.104(d)(2); *County of Alameda v. Johnson* (1994) 28 Cal.App.4th 259, 261, fn. 1.) Here, no signed order was entered until August 14, 2008. The appeal is timely.

2. *By accepting the benefits of the settlement, Casas waived her right to appeal.*

a. *No explicit waiver*

Record Town asserts that, by executing the Agreement by which she promised to dismiss the entire action with prejudice upon receiving Record Town's payment of the court-ordered fee award, Casas explicitly waived the right to prosecute an appeal of an order awarding attorneys' fees and costs. Casas insists the dismissal to which she agreed deals only with the matters put at issue in the pleadings. She contends the issue of attorneys' fees and costs is an independent, collateral matter from which her appeal is entirely proper.

It is well settled that a party may waive its right to appeal. (*Hibernia Savings etc. Soc. v. Waymire* (1907) 152 Cal. 286, 287–288; *Lovett v. Carrasco* (1998) 63 Cal.App.4th 48, 53.) Generally speaking, a party’s waiver or abandonment of the right to appeal must be clear and express. (*Kim v. Euromotors West/The Auto Gallery* (2007) 149 Cal.App.4th 170, 175, fn. 4; *McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1985) 176 Cal.App.3d 480, 488 (*McConnell*).)

For example, in *Reisman v. Shahverdian* (1984) 153 Cal.App.3d 1074, 1082, an agreement stating that “‘once the arbitrators have rendered an award, no appeal or further proceeding will be possible’” was insufficiently specific; it was not clear whether the parties understood their “waiver” of appeal included judicial review of an award, as distinguished from the arbitrators’ actions. (*Id.* at pp. 1088–1089.) Similarly, in *Lovett v. Carrasco, supra*, 63 Cal.App.4th 48, the alleged “waiver” of a party’s right to appeal was the trial court’s statement that “‘Counsel [for the claimants] . . . agreed to be bound by the decision of this Court without need of further litigation bringing closure to the entire matter.’” (*Id.* at p. 53.) The appellate court concluded that this language, which fails even to mention an appeal, did not amount to an express waiver of that right. (*Ibid.*)

In contrast, *Pratt v. Gursey, Schneider & Co.* (2000) 80 Cal.App.4th 1105, provides a good illustration of an express waiver of the right to seek appellate review. There, the parties’ stipulation to binding arbitration provided “‘the right to appeal from the arbitrator’s award or any judgment thereby entered or any order made’ was ‘expressly waived.’” (*Id.* at p. 1108.) Along the same lines, in *McConnell, supra*, 176 Cal.App.3d 480, the parties expressly granted the trial court absolute discretion to determine the amount due class action claimants, and agreed its decision would “‘not be appealable by any of the parties to this Settlement Agreement.’” (*Id.* at p. 486.) This was deemed an unambiguous demonstration of an intent to disallow judicial review of the trial court’s decision.

The settlement agreement here contains no such unambiguous waiver, and resembles the language used in the *Reisman* and *Lovett* cases more than that of *Pratt* or *McConnell*. Casas’s agreement to “dismiss the entire action with prejudice” upon receipt

of the fee payment, lacks the clarity necessary to constitute an unequivocal waiver of the right of judicial review.

b. *Implied waiver*

Record Town also contends Casas impliedly waived the right to appeal by accepting the payment and benefits of the settlement funds and attorneys' fees award. On this point, Record Town is correct.

"It is the settled rule that the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal therefrom. [Citations.]" (*Schubert v. Reich* (1950) 36 Cal.2d 298, 299; *Mathys v. Turner* (1956) 46 Cal.2d 364, 366; *Lee v. Brown* (1976) 18 Cal.3d 110, 114 [the right to appeal a judgment is waived by one who accepts some or all of its benefits].) The rule is grounded in the principle that the right to accept the fruits of a judgment and the right to attack the judgment on appeal are wholly inconsistent; the election of one is a renunciation of the other. (*Schubert v. Reich, supra*, 36 Cal.2d at pp. 299–300; *Lee v. Brown, supra*, 18 Cal.3d at p. 114.)²

As with most rules, this one has an exception. That exception applies in cases in which an appellant is concededly entitled to the benefits of a judgment she has accepted, and her right to those benefits would not be affected by a reversal on appeal. (*Lee v. Brown, supra*, 18 Cal.3d at p. 115; *Lovett v. Carrasco, supra*, 63 Cal.App.4th at p. 53; *Epstein v. DeDomenico, supra*, 224 Cal.App.3d at p. 1246.) Casas insists she falls within this exception because Record Town did not appeal the trial court's fee award; it just paid her \$2,000. Hence, *that* amount of fees is not in dispute, and the sole issue on appeal is whether she is entitled to a greater fee recovery.

² The rule also applies where, as here, the benefits of a settlement are accepted before judgment is entered. (*Epstein v. DeDomenico* (1990) 224 Cal.App.3d 1243, 1247–1248 ["a settlement subject to enforcement under [Code of Civil Procedure] section 664.6 is equivalent to a judgment entered on the authority of that section"]; cf., *Trollope v. Jeffries* (1976) 55 Cal.App.3d 816, 824–825 [acceptance of benefits of arbitration award prior to order confirming award waives right to appeal from that order].)

Record Town disagrees. It maintains the exception does not apply because it never conceded Casas was entitled to the amount of fees it paid her. Rather, it paid her what the court awarded because it was required by the Agreement to do so.

In the fee motion, Casas's attorneys claimed an entitlement to over \$16,000 for their work in this litigation. Record Town vigorously contested that assertion, arguing Casas was entitled, at most, to nominal fees. Record Town asserted that Casas's counsel was in the practice of targeting business establishments for purported or isolated ADA violations, solely for the purpose of collecting attorneys' fees. It denied Casas had "prevailed" in the action. Rather, Record Town noted it had fixed the inaccessible sales counter even before it answered the complaint, and agreed to settle a case of questionable merit for a nominal amount without admitting liability, solely in order to "buy peace." Finally, Record Town observed that, although Casas's stated goal was accessibility, she filed this case without giving Record Town an opportunity to rectify a single accessibility violation. Moreover, the case was not novel; Casas's pleading was a thinly veiled version of the same boilerplate complaint her attorneys had used in numerous other actions. Accordingly, while Record Town did not claim that Casas was due no fees, it did argue that \$16,000 would be an extremely unreasonable award under these circumstances.

Initially, the trial court seemed to agree with Record Town. In its tentative ruling, the trial court noted Casas filed the action without giving Record Town an opportunity to cure the sole ADA violation alleged, and that she had rejected a settlement offer made by Record Town six months earlier, for \$250 more than she ultimately accepted. The court observed that "given the nature of the case and the relief sought, the amount of time purportedly spent on litigating this case was unjustified." Its tentative inclination was to award \$500 in fees for Record Town's "technical violation." Casas's counsel successfully persuaded the court that a \$500 fee award would be insufficient. In the end, the court reconsidered its tentative ruling, and increased the award four-fold. Record Town tendered a \$2,000 check to Casas, which she accepted and cashed without protest.

On this record, it is evident the value of the attorneys' services was a hotly disputed issue. Indeed, it was the only issue in dispute. In the case of a reversal and

retrial, the trial court might exercise its discretion differently, and a new award could conceivably be less than \$2,000. Casas's acceptance of a portion of the attorneys' fees she sought, while appealing to recover the rest, does not fall within those exceptional cases in which reversal would not affect her right to the benefit she accepted. "[I]f a party to a judgment accepts payment or satisfaction of a part thereof which is favorable to him, and that part is of such a character that the part adverse to him cannot be reversed without affecting the part which is in his favor and requiring reversal of that part also, the party so accepting the fruits of a part of the judgment in his favor is estopped from prosecuting an appeal from those parts which are against him." (*Preluzsky v. Pacific Co-operative C. Co.* (1925) 195 Cal. 290, 293; *Epstein v. DeDomenico*, *supra*, 224 Cal.App.3d at p. 1246.)³ Casas's unqualified acceptance of Record Town's payment of the attorneys' fees award constituted a waiver of her right to pursue this appeal.⁴

³ As the court in *Epstein v. DeDomenico*, *supra*, 224 Cal.App.3d 1243, observed, an important reason for this rule is that settlement of disputed claims often involves multiple compromises and concessions which may not appear interdependent to those who did not participate in settlement discussions, but which may have been pivotal to one or more party's decision to accept other, apparently unrelated, terms of the agreement. For that reason, courts are reluctant to find any term of a negotiated settlement severable from the rest, absent a clear showing of independence. (*Id.* at p. 1247.) As in *Epstein*, no such showing was made here.

⁴ Casas could not prevail in this action, even if she had not waived her right to judicial review. We review the amount of an attorneys' fee award for an abuse of discretion. (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) "An experienced trial judge is best qualified to decide the value of an attorney's services in a given matter, and on appeal we will not reverse that decision unless it is clearly wrong. [Citation.]" (*Padilla v. McClellan* (2001) 93 Cal.App.4th 1100, 1107.)

In determining a fee award, the trial court first determines a "lodestar" figure, or the product of the number of hours worked multiplied by a reasonable fee per hour. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 48.) That figure may then be adjusted up or down, depending on a number of nonexhaustive factors. (See *id.* at p. 49.) Some important factors are the novelty and difficulty of issues involved in the action, the skill displayed in presenting them, the risk incurred by the attorneys litigating the case, and the results achieved. (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 584.) Based on these factors and the particular circumstances of the case, the court determines whether the

3. *Sanctions are not warranted*

We reject Record Town’s invitation to impose sanctions on Casas for this purportedly frivolous appeal. Appellate sanctions are imposed under the standard articulated in *In re Marriage of Flaherty* (1982) 31 Cal.3d 637. That standard requires that the appellant’s conduct be “‘frivolous or taken solely for the purpose of delay.’” (*Id.* at p. 646.) *Flaherty* sanctions are appropriate “only when [the appeal] is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit.” (*Id.* at p. 650.) Sanctions should not be imposed in any “but the clearest cases.” (*Ibid.*) An argument is not frivolous merely because it advocates a position that is “extremely unlikely” to succeed. (*Ibid.*) Although we disagree with Casas’s position, we do not find the appeal was brought for an improper purpose, or that her arguments are not so wholly lacking in merit as to justify the imposition of sanctions under *Flaherty*’s demanding standard.

DISPOSITION

The appeal is dismissed.

Each party is to bear its or her own costs on appeal.

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lodestar is a reasonable amount or, if not, reduces or increases its award to a reasonable figure. (*PLCM Group, Inc. v. Drexler, supra*, 22 Cal.4th at pp. 1095–1096.)

Here, the court clearly used modifying factors to reduce the fee award. It expressed its view that the case was neither novel nor difficult, and did not justify the amount of time purportedly spent in litigation. The court was also swayed by the fact that Casas had not even tried to seek a voluntary remedy by Record Town before filing suit. Although no statute required Casas to do so, and this fact would not justify a complete denial of fees, it could properly be considered by the trial court as a factor to lower the ultimate award Casas received, inasmuch as the provision of an opportunity to cure might have caused Record Town to lower its inaccessible counter without the need for this action. Under the circumstances, if we were to consider the merits of this appeal, we would find the trial court acted within its discretion to reduce the lodestar calculation.

WEISBERG, J.*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.